IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 491 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
MUKESHBHAI RATILAL SHAH & 2 - Respondents

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Appearance :

MR. M.A. PATEL, LD. APP for Appellant:
NOTICE SERVED for Respondents: 1 - 3.
MS DAKSHA L SHAH for Respondents: 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 17/11/2006

ORAL JUDGMENT

1. Heard Shri. M.A. Patel, learned APP for the appellant State of Gujarat and Shri. D.K. Modi, learned counsel for the respondents, who had accepted the request to assist the Court on behalf of the respondents.

2. The appellant State of Gujarat has preferred this appeal under Section 378 of the Code of Criminal Procedure (hereinafter referred to as the 'Code' for brevity), challenging the order of acquittal dated 12/3/1998 passed by learned Metropolitan Magistrate, Court No.8, Ahmedabad in Criminal Case No. 55 of 1995, acquitting the accused of the charges under Section 7 and 16 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as “PFA Act”). This Court (Coram: A.M. Kapadia, J) granted leave and admitted the appeal on 28/7/1998. This matter was listed for hearing on 15/11/2006. No one appeared for the respondents / original accused. As the matter was of the year 1998, this Court was not inclined to adjourn and Shri. Modi, learned counsel was requested to assist the Court. Accordingly the matter was fixed and Shri. Modi has readily agreed to assist, and thereafter this matter was posted on 17/11/2006, i.e. today.

3. Brief facts leading to filing of this appeal deserves to be set out as under :-

3.1 The original complainant Food Inspector on 25/10/1994 at 10.30 a.m., in the morning visited Shop No. 1488/1 of the accused situated in old Madhupura, Ahmedabad. The vendor was engaged in trading of ghee. The helper of Food Inspector had also accompanied him. After introducing himself as Food Inspector and calling a panch witness, and after notifying his intention to send sample of ghee for analysis, purchased 400 grams pure ghee from the open tin lying in the shop. The requisite notice under Rule 12 in form No.6 was issued, which was countersigned by accused no.1 and panch witness. Said notice is at exhibit-8. The payment of Rs.52=00 was made for purchasing the ghee for the purpose of analysis. The cash memo and receipt bearing signature of accused and the panch is at exhibit 9 and 10. Said ghee thereafter was transferred in to three transparent glass bottles in equal proportion and the glass bottles were thereafter tightly closed with tight corks. Complainant food inspector attested the slip of Local Health Authority, Gujarat State and it was sealed with metal seal bearing no.3. It is stated that before collecting the ghee for sample, the quantity was stirred with the help of spoon. The sample bottles were properly sealed and panchnama was drawn in accordance with law. The panchnama is at exhibit-12. On 26/10/1994 memorandum in form no. 7 came to be prepared and one sample out of the three was sent to the

Public Analyst at Vadodara and the specimen seal used for sealing bottles was also sent separately. The remaining two bottles of samples were sent to Local Health Authority, Gujarat State at Gandhinagar, along with copy of memorandum and intimation that the sample was taken, which is at exhibit-13. Office copy of the specimen impression of seal is at exhibit-14. Local Health Authority issued receipt for receiving sample which is at exhibit-15. The Public Analyst also issued receipt of having received the same, said receipt is at exhibit-16. The registered A.D. Slip is produced at exhibit-17. Food Inspector was informed vide letter dated 4/8/1995 by the Local Health Authority, Gujarat State, at Gandhinagar that the sample was opined to be adulterated. Copy of the Public Analyst Report and details of samples were sent by one Shri. J.D. Naikar, and the signature was identified by him and was exhibited at exhibit-18. The Public Analyst in his report has stated that as presence of turmeric was found in the sample it was declared to be adulterated. The constitution of the firm was called for vide food inspector's letter dated 16/8/1995. Food Inspector submitted papers on 19/8/1995 to the Local Health Authority, Gujarat State at Gandhinagar for obtaining permission for lodging prosecution as envisaged under section 20 of the Act. Office copy of the request letter is at exhibit-25. The Deputy

Commissioner And Local Health Authority, Gujarat State, vide letter dated 14/10/1995 issued sanction for lodging prosecution against the accused/respondents. His signature was identified by food inspector and it is produced at exhibit-26. The complaint was thereafter lodged on 14/11/1995 which is at exhibit-1. On 15/11/1995 food inspector informed Local Health Authority that complaint was filed, copy of that letter is at exhibit-27. The Local Health Authority on that very day by registered A.D. Sent report and notice under section 13 (2) to the accused so as to enable them to have the sample tested at the end of Central Food Laboratory. The report of the Central Food Laboratory also declared the sample to be adulterated on the count of presence of moisture and non conformity with the R. Value, which was found to be less than the prescribed limit. The plea of denial was recorded and the trial begun. After recording evidence, accused's statement came to be recorded under section 313 of the Code. The accused denied the case of the prosecution. Trial court after analysing the evidence came to the conclusion that the prosecution failed in establishing its case beyond doubt and therefore, accused were acquitted of the charge of commission of offence under section 7 and 16 of the Act. This order of acquittal dated 12/3/1998 is impugned in the present appeal.

4. Shri. Patel, learned APP has taken this Court through the original record and also relevant case papers pertaining to criminal case no. 55 of 1995. Shri. Patel has vehemently urged that the trial court judgment & order of acquittal being erroneous deserves to be quashed and set aside. Shri. Patel has submitted that the trial court has wrongly relied upon decision of this Court, as facts of both the cases were different and therefore it was not applicable. Shri. Patel has submitted that the trial court ought to have convicted the accused and imposed appropriate punishment as sample ghee was declared to be adulterated even by Director of Central Food Laboratory. Shri. Patel has further submitted that the trial court has acquitted the accused only on the count that sample of ghee was not collected by stirring and or after heating so as to make it homogeneous. Shri. Patel has submitted that this finding of the trial court is not supported by the evidence on record. Shri. Patel has invited this Court's attention to the deposition of complainant food inspector and pointed out that the food inspector has stated in his deposition that before taking sample the ghee which was found in a semi liquid condition was stirred. The requirement of heating is basically for the purpose of making the quantity homogeneous so as to make the sample representative of the quantity. When it

is stated by the complainant food inspector that the sample in question was taken after stirring the quantity then it can well be said that the quantity was made homogeneous before the sample was taken. In view of this, the trial court finding that there was non compliance with requirement of taking sample of ghee was erroneous and therefore the impugned judgment & order of acquittal deserves to be quashed and set aside.

5. Shri. Modi, learned counsel has submitted that this being an acquittal appeal the order of acquittal need not be interfered with unless & until it is established by the appellant that the findings and reasonings adopted for acquittal are so perverse as to result into miscarriage of justice. Shri. Modi has further submitted that the accused respondents have right to support the order of acquittal on independent grounds than the grounds whereupon the acquittal is recordd in the impugned order. Shri. Modi has submitted that the order of acquittal deserves to be sustained and this appeal could be dismissed mainly on two grounds, namely (1) that the requirement of taking sample of ghee after heating the ghee is admittedly not followed in the present case; and (2) the duty cast upon statutory authority was performed by the person incharge and therefore the prosecution case stood vitiated.

6. Shri. Modi has invited this Court's attention to the decision in case of LAXMICHAND BHAILAL THAKKER V. STATE OF GUJARAT, reported in 1995(2) GLR, pg. 1528, wherein this Court has in para no.7 observed as under:-

" 7. In view of the facts of the case, I am of the opinion that the entire quantity of ghee should have been heated or boiled and that the contents of the tumbler where from the sample of ghee was collected should have been thoroughly stirred. This becomes all the more necessary as there is prescribed limit for melting and if it is above the maximum prescribed, the sample would likely be adulterated. It would, therefore, be necessary to have quantity of ghee homogeneous in character by melting and stirred as well. "

7. Shri. Modi has also relied upon a decision of this Court in Criminal Appeal No. 506 of 1996 (Coram: J.M. Panchal, J) decided on 1/12/2004, in support of his submission that when sample of food article like ghee is taken, then it is required to be heated. Shri. Modi has also relied upon this Court's decision (Coram: S.R. Brahmbhatt, J) in Criminal Appeal No. 565 of 1996 decided on 12/8/2005 in support of his submission, wherein this Court relying upon the decision in case of Laxmichand Bhailal Thakkar

Vs. State (supra) and another decision of this Court (Coram: M.H. Kadri, J) in case of State of Gujarat Vs. M/s. Harkhchand Dahyabhai in Criminal Appeal No. 670 of 1990 decided on 16/11/2000 held that the sample article like ghee is required to be taken after appropriately stirring and heating, making it to be homogeneous.

8. Shri. Modi has submitted that stirring alone, assuming for the sake of argument, was done, then also it was the duty cast upon the food inspector to comply with the requirement of heating as it is specifically observed by this Court in case of Laxmichand Bhailal Thakkar (supra) that mere stirring wold not amount to making the substance like ghee homogeneous.

9. Shri. Modi in support of his contention submitted that the statutory duty can not be performed by incharge officer. In support of his submission he has relied upon this Court's decision in case of THE STATE OF GUJARAT V. DHIRAJLAL AMRATLAL KANSARA & ANR, reported in 16 GLR pg. 982, wherein the Division Bench of this Court has clearly observed that, statutory duty is to be performed by the person regularly appointed for so discharging statutory duty. The incharge officer holding temporary charge of the post can not perform the statutory duties so as to sanction lodging prosecution.

10. Shri. Modi has invited this Court's attention to the deposition of the complainant food inspector wherein the complainant has admitted in his cross examination that Shri. M.S.S. Kadri was incharge Deputy Commissioner. He has also admitted that it is true that paper slip contained signature of Shri. Kadri. However he has denied that it was not true that he had no right or authority to discharge duties of Local Health Authority. The food inspector denied the suggestion that Shri. J.D. Naikar was incharge Deputy Commissioner. However he has voluntarily stated that he was Deputy Commissioner. Shri. Modi has invited this Court's attention to Rule 16-C, wherein it is clearly provided that a paper slip of the size that goes round completely from the bottom to top of the container, bearing the signature and code and serial number of the Local (Health) Authority, which is required to be pasted on the wrapper of the sample bottle. In the instant case as stated herein above food inspector has stated that Shri. Kadri was only holding charge and in light of the judgment of the Division Bench in State Vs. Dhirajlal Amrtlal Kansara (supra) the incharge person can not discharge the statutory duties. Therefore the prosecution case stands vitiated.

11.Shri. Modi has further submitted that the

requirement of Rule 14 has also not been complied with as could be seen from the record.

12. This Court has heard learned counsels at length and perused the record. This Court is unable to accept the submission of Shri. Patel, learned APP that stirring of ghee before taking sample was sufficient compliance with requirement of heating ghee as it is only for making it homogeneous. The ghee as such even if it is in semi liquid form as it is stated by food inspector can not be said to be made homogeneous merely on account of it being stirred. The Director, Central Food Laboratory in his report has indicated that the ghee was in semi solid form and it was required to be melted so as to see presence of sediments. Thus the submission of Shri. Patel that ghee if it was stirred before the sample was taken, then, the same can be said to be homogeneous and requirement of it being heated is not warranted, is misconceived and this Court is unable to agree with the same. The requirement of stirring it as well as heating ghee before the sample is taken is recognized by this Court and other Courts time and again. The decision of this Court in case of Laxmichand (supra) in unequivocal terms state that the ghee is required to be heated before sample is taken. Thus it is an admitted position in the present case that sample of ghee

was collected without even heating or making it in liquid.

13. The second contention of Shri. Modi with regard to performance of statutory duty by incharge person and its repercussions carries due weight and it requires consideration. The third contention also, that there is no evidence led by the prosecution except the averment that clean bottles were used, would go to show that the prosecution has not demonstrated and established due compliance with procedure of provision of Rule 14. This Court in case of STATE OF GUJARAT Vs. BHUPENDRA M. MEHTA, REPORTED IN 1999 (1) GLH, pg. 227 clearly observed that, Rule 14 is not merely to be complied with but it is the bounden duty cast upon the prosecution to lead cogent evidence to prove its due compliance. Meaning thereby mere word of using clean bottles in itself would not amount to compliance with mandatory provision of Rule 14. In the instant case, as it is seen herein above, except the statement that the clean bottles were used no other evidence has been led by the prosecution. As against this, there is admission on the part of food inspector concerned that the bottles used for collecting samples were given to him through his department which he has used. Thenafter, he has rested there.

14.In the instant case, in view of the aforesaid discussions, this Court is of the view that the prosecution has failed in proving its case beyond reasonable doubt and the judgment & order of acquittal dated 12/3/1998 passed by learned Metropolitan Magistrate, Court No.8, Ahmedabad, in Criminal Case No. 55 of 1995 does not call for any interference. In the result, the appeal deserves to be dismissed and accordingly it is dismissed. Bail bonds, if any, shall stand cancelled.

[S.R. BRAHMBHATT, J]

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